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No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1986

WHITE PLAINS AUTOMOTIVE SUPPLY CO., INC. and DORLEE PROPERTIES CORP.,

Appellants,

against

CITY OF PEEKSKILL,

Appellee.

On Appeal from the Court of Appeals, State of New York

JURISDICTIONAL STATEMENT AND APPENDIX

GREENE & ZINNER, P.C.
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QUESTIONS PRESENTED BY THE APPEAL

1. Is the City of Peekskill's Local Traffic Ordinance §132-41 constitutional?

2. Where does the reasonable exercise of the police power of a municipality end and a "taking", prohibited by the Constitution, begin?

3. Does legislation which has as its purpose the elimination of truck traffic through residential streets derogate from the constitutional requirement that just compensation be paid for private property taken for public use?

4. Will the enforcement of a local traffic ordinance, which will destroy substantially all of the appellants' property interests under the guise of promoting the general welfare, violate federal constitutional guarantees?

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White Plains Automotive Supply Co., Inc., et al v. City of Peekskill 115 A.D.2d 728, 497 N.Y.S.2d 389

Rule 28 Information

The appellant corporations have no parent companies, subsidiaries or affiliates.

GROUNDS FOR JURISDICTION

This is a direct appeal from the New York Court of Appeals. The date of entry of the remittitur order of the New York Court of Appeals affirming the lower Court's decision is November 11, 1986. The Notice of Appeal was filed by mail with the New York Court of Appeals on February 9, 1987 and a copy was served on the New York Supreme Court, Westchester County.

The jurisdiction of this Court rests upon 28 U.S.C. §1257(2) in that the plaintiffs have consistently alleged throughout the course of the state proceedings that the local traffic ordinance of the City of Peekskill is repugnant to the Constitution, U.S. Const., 14th amdt. §1 and the decision of the New York Court of Appeals is in

favor of the validity of the local traffic ordinance.

LOCAL TRAFFIC ORDINANCE

Section 134-41 of Article XV of the Traffic Ordinance of the City of Peekskill

No Commercial Vehicle exceeding 27 feet in length shall be permitted to traverse the following streets of the City, except for purposes of emergency or moving of residential or personal property (street listing omitted)

STATEMENT OF THE CASE

In 1973 plaintiff Dorlee Properties Corp. (Dorlee) began leasing an 11.8 acre parcel of property in a district

designated for light industry. Its property was located in the Town of Cortlandt at the southern boundary of the City of Peekskill. In 1979 Dorlee purchased the subject premises. Plaintiff White Plains Automotive Supply Co., Inc. (WPA), an automotive supply business owned and operated by Dorlee's principals, operated a wholesale automotive parts supply business out of a warehouse leased from Dorlee and located on a dead end street in the Town of Cortlandt. However, the only access to plaintiff's property was through a residential neighborhood in the City of Peekskill. After approximately nine years of uninterrupted access to plaintiff's premises, the City of Peekskill adopted a local traffic ordinance prohibiting passage of vehicles in excess of 27 feet in length from

traversing the local residential streets leading to the sole access road to plaintiff's premises.

In that plaintiff WPA receives truck deliveries via interstate carriers, all of which make delivery by trucks exceeding 27 feet in length, the ordinance effectively deprives the plaintiff WPA of its ability to continue its operations. Moreover, since the plaintiffs were located at a dead end street the ordinance was directed entirely at its operations. Also, because the local traffic ordinance did not provide compensation to the plaintiffs for the ruination of their enterprises, plaintiffs contended throughout the trial and appellate levels of the New York State Courts that the legislation violated constitutional due process requirements.

The constitutionality of the local traffic ordinance was the sole issue raised in the Supreme Court, Westchester County. In the intermediate appellate Court the issue of constitutionality was the sole issue raised. Similarly, in the New York Court of Appeals the sole issue on appeal was the constitutionality of the local ordinance. Each of the Courts identified upheld the validity and constitutionality of the ordinance. The New York Court of Appeals unanimously affirmed the decision of the lower Court based upon the reasons stated in the memorandum opinion.

ARGUMENT

WHEN REGULATION GOES SO FAR AS TO IMPOSE A WHOLLY UNIQUE BURDEN UPON A PRIVATE PROPERTY OWNER AND INTERFERES WITH REASONABLE INVESTMENT BACKED EXPECTATIONS, IT MUST BE RECOGNIZED AS A TAKING.

It is clear that under certain circumstances governmental action which falls short of actual physical occupation of property will nonetheless amount to a taking. See, e.g. Penn Central Transportation Co. v. City of New York, 438 U.S. 104; United States v. Causby, 328 U.S. 256. An inquiry into whether a taking has occurred "requires an examination of whether the restriction on private property force(s)

some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (quoting Armstrong v. United States, 364 U.S. 40, 49). In turn, to fully examine the restriction under a constitutional microscope, a tripartite inquiry must be applied.

THE PENN CENTRAL FACTORS

Penn Central Transportation Co. v. City of New York, supra involved the application of New York City's Landmark Preservation Law to Grand Central Terminal. In upholding the validity of

the regulation*, the Court surveyed the general principals governing the taking clause. The principals noted were the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations. Id., at 124.

The general rule is "that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking"

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*We note the petitioner in Penn Central conceded that the Landmark Preservation Law would not render it incapable of earning a reasonable return on its investment. The Landmark Preservation Law merely denied the petitioner the ability to exploit a property interest that it theretofore believed was available, i.e., the right to develop the air rights above the terminal.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415. In Pennsylvania Coal the statute at issue forbade coal mining in such a way as to cause the subsidence of a house within 150 feet of the mine. There, although safety was the reason underlying the statute, the Court declared the statute unconstitutional: The prohibition against removal of coal, without compensation even in the interest of a neighbors' safety, was held a taking. So too, where regulation at best has a tenuous relationship to the objectives cited by the municipality it may constitute a taking. (See, e.g., Nectow v. Cambridge, 277 U.S. 183, 188. Moore v. East Cleveland, 431 U.S. 494). Here, the character of the governmental action is a vehicular restriction which, without actual physical occupation of

the land, deprives the appellants of all beneficial use of their land or business interests. The character of the Peekskill ordinance imposes a wholly unique burden on Dorlee and WPA because the law is specifically applicable only to them.

We do not contend that the mere diminution of the value of Dorlee's property, standing alone, constitutes a taking. However, it is an important factor to be considered in the balancing of public versus private interests. In Hadacheck v. Sebastian, 239 U.S. 394 the Court upheld an ordinance prohibiting the claimant from continuing his brick manufacturing business even though the diminution to the value of his land was substantial. The Court went on to emphasize that the ordinance only

prohibited the manufacture of the brick and did not preclude the mining of the clay on the land. Similarly, in Goldblatt v. Town of Hempstead, 369 U.S. 590 the Court upheld an ordinance regulating dredging and pit excavation. The petitioner in Goldblatt had, through its mining operations, excavated the land so that a 20 acre lake was created which was within 3,500 feet of 2,200 houses and four public schools with a combined enrollment of 4,500 pupils. Because the petitioner in Goldblatt made no showing "in terms of dollars or some other objective standard how much if anything, the imposition of the ordinance would cost" (at p. 595) the Court assumed that the petitioner had other reasonable uses for his property. Analysis of the reasoning of the Court

in the Hadacheck, Goldblatt, Penn Central, and Pruneyard reveals that in each case the ordinance or regulation was upheld, notwithstanding significant diminution in the value of the private property, because the private property had other reasonable income productive uses: In Hadacheck the claimant could mine the clay for manufacture elsewhere; in Goldblatt the Court, in the total absence of proof to the contrary, properly assumed other productive uses; Penn Central on the other hand had substantial resources for income even were it unable to develop its air rights; and Pruneyard Shopping Center's income productive activities were only marginally affected by the solicitation in its privately owned shopping center

for signatures from passersby for petitions in opposition to a United Nations resolution. In the case at issue here, Dorlee's only asset is its land which cannot be used by light industry because of the ban on trucks exceeding 27 feet in length. There is no income productive use remaining for Dorlee once the ordinance is enforced which will realize sufficient funds to cover operating expenses (debt service and taxes) or produce even a modest profit. While there is no constitutional right to a guaranteed positive rate of return there is a constitutional right to compensation when private land is confiscated for public use: The deprivation of all reasonable land uses is economically confiscatory and hence

unconstitutional. Accordingly, we contend that when diminution of land value achieves a situation where no reasonable income productive use remains to the private property owner, a taking prohibited by the Constitution occurs. When regulation unconstitutionally deprives an individual of his property rights our Courts must enforce the constitutional guarantees or our government of limited powers will be unrestrained (Mugler v. Kansas, 123 U.S. 623).

The economic impact of the Peekskill ordinance deprives the appellants of their ability to manage their business, in the case of WPA, or to realize a profit from the use of their land in the case of Dorlee. Here, there is ample evidence, in dollars and cents,

of how much the ordinance will cost the appellants. There is also ample evidence that no reasonable use exists for which Dorlee's property can be adapted. Additionally, the instant ordinance is also unduly oppressive because it affects the entirety of the appellants' interests and property thereby eliminating any prospect that the appellants can remain in business.

Finally , it appears that the reasonable investment-backed expectations of the appellants are vitiated by the Peekskill ordinance. "Reasonably investment-backed expectations" refers to investment made for a particular purpose. (Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 149, 152 rev'd on other grounds 458 U.S. 435) For

example, in Kaiser Aetna v. United States, 444 U.S. 181 a private marina-style community was developed through a dredging and filing operation of Kuapa Pond in Hawaii. During expansion the developer connected the marina to the bay and thereby brought it within navigable waters open to the public. The government, through the Army Corps of Engineers, contended that the marina was thenceforth accessible to the general public without payment of the marina membership fees. The Court held that the government could not turn Kuapa Pond into a public aquatic park without invoking its eminent domain power or paying just compensation. The Court cited the specific investment expectation held by the petitioner that its conversion of the Kuapa Pond would

result in increased revenue from fee paying members. Here, Dorlee brought the property for the express, particular purpose of raising revenue from industrial tenants who had occupied the premises for years. Its expectations were reasonable because it merely substituted itself for the previous landlord who had long enjoyed the very benefits Dorlee sought. Here, there was no attempt to use the land for a new purpose; nor was there any attempt to exploit the land by using it for purposes inconsistent with or uncharacteristic of the area.

Applying the facts in the instant case to the factors enumerated in Penn Central demonstrates that Peekskill, in an attempt to exercise its police power, went too far and effectuated a taking.

Rather than reasonably addressing the concerns of the Bleloch Park's citizens by balancing public and private interests, the City shut its eyes to reasonable accommodation, and made good its threat "to get those trucks out" (R524-26).

The ordinance at bar permanently prohibits the appellants from engaging and/or maintaining their enterprises: It fails to measure up to the standards fixed by the United States Supreme Court for the valid exercise of the police power. It is as naked a taking as if the City had entered upon appellants' property and permanently dispossessed them without compensation.

Legislation enacted for the purported benefit of the general public

must be rational in design, reasonable in effect and constitutional in scope. When the effect of such legislation is to deprive a private property owner of all reasonable productive uses of his property thereby destroying all but a bare residue of its value, the legislation fails to meet guaranteed constitutional standards.

Where, as here, the local traffic ordinance will put WPA out of business and render Dorlee incapable of meeting its operating expenses, it violates the due process clauses of the Federal Constitution. The taking of private property for public use, without provision for compensation, is constitutionally impermissible. Furthermore, the public benefit sought by enactment of the ordinance is public convenience

and preference. Those aims are not paramount to appellants' constitutional right to due process.

STATEMENT OF REASONS FOR PLENARY CONSIDERATION

We contended in the New York State Courts that the general principles governing the taking clause as surveyed by this Court in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 required a finding that the local traffic ordinance was unconstitutional in that it violated the due process clause of the 14th amendment. Indeed, our position was that the reasonable investment-backed expectations of the plaintiffs were vitiated by the Peekskill ordinance and ran contra to

this Court's holdings in Kaiser Aetna v. United States, 444 U.S. 181 and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393. In the final analysis our position was that the taking of private property for public use, without provision for compensation was and is constitutionally impermissible. The aims of the Peekskill legislature in promulgating the offending legislation to further public convenience and preference by eliminating truck traffic are not paramount to the plaintiffs' constitutional right to due process.

The issue presented raises substantial constitutional questions. A decision by this Court will further refine and clarify the standard applicable in determining where the reasonable

exercise of the municipal police power ends and a "taking" prohibited by the Constitution begins. Accordingly, briefs on the merits and oral argument are necessary to adequately review the issues raised on a direct appeal.

Dated: White Plains, New York
February 9, 1987

Respectfully submitted,

GREENE & ZINNER, P.C.
by: Stanley S. Zinner

APPENDIX

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge,

Presiding

2 No. 366

White Plains Automotive Supply Company, Inc., et al,

Appellants,

v.

The City of Peekskill,

Respondent.

The appellant(s) in the above entitled appeal appeared by Greene & Zinner, P.C.;

the respondent(s) appeared by William J. Florence, Jr., Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, for reasons stated in the memorandum of the Appellate Division (115 AD2d 728). Chief Judge Wachtler and Judges Meyers, Simons, Kaye, Alexander, Titone and Hancock concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Westchester County
there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

_____

Donald M. Sheraw, Clerk
of the Court

Court of Appeals, Clerk's Office,
Albany, November 11, 1986.

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p/jc

GUY J. MANGANO, J.P.
WILLIAM C. THOMPSON
FRANK D. O'CONNOR
MOSES M. WEINSTEIN,JJ.

_____ AD2d _____

A-June 17, 1985

1637 E

White Plains Automotive Supply Company, Inc., et al, appellants v. The City of Peekskill, respondent.

Greene & Zinner, White Plains, N.Y. (Stanley S. Zinner of counsel), for appellants

William J. Florence, Jr., Corporation Counsel, Peekskill, N.Y. (Frank A. Catalina and Bernis S. Nelson of

counsel), for
respondent.

In an action to declare a local traffic ordinance unconstitutional, plaintiffs appeal from a judgment of the Supreme Court, Westchester County (Marbach, J.), dated December 20, 1984, which, inter alia, upheld the ordinance after a nonjury trial.

Judgement affirmed, with costs.

Plaintiff White Plains Automotive Supply Company, Inc. (WPA) operates a wholesale automotive parts supply business out of a warehouse leased from plaintiff Dorlee Property Corp. (Dorlee) and located on a dead-end street in the Town of Cortlandt, Westchester County. The only access to

the warehouse is through a residential neighborhood in the defendant City of Peekskill (the city). At issue is whether a local traffic ordinance enacted by the city, limiting the use of streets in the access neighborhood to commercial vehicles of less than 27 feet (except in an emergency or for moving residential personal property), is a valid exercise of the police power pursuant to Vehicle and Traffic Law §1640. Upon a prior review by this Court, the matter was remitted for an evidentiary hearing to determine whether the effect of the ordinance in promoting the health, safety and welfare of the community outweighed the hardship caused to individual property owners (White Plains Automotive Supply Co. v. City of Peekskill, 98 A.D.2d 776). Following

that hearing, nisi prius found and declared the ordinance to be constitutional. We now affirm.

It is beyond cavil that a city has the right and power to enact a reasonable ordinance to prohibit certain classes of vehicles from passing over designated streets (see, Bakery Salvage Corp. v. City of Lackawanna, 24 N.Y.2d 643; Peconic Ave. Businessmens' Assn. v. Town of Brookhaven, 98 A.D.2d 772, 773). Such an ordinance, valid on its face, carries with it a strong presumption of constitutionality (see, Elmwood-Utica Houses v. Buffalo Sewer Authority, 65 N.Y.2d 489; Lighthouse Shores v. Town of Islip, 41 N.Y.2d 7), and in light of this strong presumption, a plaintiff attacking the ordinance carries the heavy burden of demonstrating beyond a

reasonable doubt that the legislative enactment is arbitrary--that it has no substantial relationship to the public health, safety or general welfare (see, Northern Westchester Professional Park Assoc. v. Town of Bedford, 60 N.Y.2d 492, 500; Town of North Hempstead v. Exxon Corp., 53 N.Y.2d 747; French Investing Co. v. City of New York, 39 N.Y.2d 587, 596, cert denied 429 US 990).

At the hearing, evidence was presented of the unconstitutionality of the 21 to 24-foot-wide residential streets for traffic by large (mostly 40 foot and over) trailer trucks (these trucks would, for instance, swing wide into both lanes of the street, mount curbs and even swing onto adjacent sidewalks) and of the resulting damage

to curbs, sewers, utility lines and trees, as well as of attendant noise, diesel fumes, air pollution, vibration and cracking of plaster. There was also evidence that the city investigated these conditions by hearing from residents, by sending its staff to observe, by conferring with plaintiffs, and by consulting a transportation engineer, and that only after such proposed solutions to these problems, such as construction of new access to plaintiffs' property and widening the existing streets with concomitant taking of private property, proved to be impractical and cost-prohibitive did the city enact the subject ordinance. There was further evidence that the city set the truck-length limitation at 27 feet for reasons of safety as well as to

"allow trucks for local deliveries and trucks such as United Parcel Service trucks". Unlike the case of Peconic Ave. Business mens' Assn. v. Town of Brookhaven (supra), where no facts in support of the ordinance were adduced, here ample evidence was offered relative to dangers associated with truck traffic passing through the residential neighborhood as well as the city's efforts to explore alternative possibilities and adjust equities between the residents and the plaintiffs, who require deliveries. Inasmuch as the plaintiffs did not rebut the evidence supportive of the ordinance, as nisi prius noted, they failed to undermine in any way the substantial relationship of the ordinance to the public welfare (see,

Bakery Salvage Corp. v. City of Lackawanna, supra).

Nevertheless, the plaintiffs contended at nisi prius that the ordinance was unconstitutional in that it deprived them of property rights without due process of law, adducing evidence, inter alia, that the ordinance would diminish the value of Dorlee's property, valued close to $1,000,000.00 by some $300,000.00 (nisi prius found the diminution in value to be $200,000.00), and had induced tenant WPA to relocate its operations to the Bronx. Concededly, the exercise of the police power is limited by the due process clause to the State and Federal Constitutions, and an ordinance, to pass muster, must not only relate to the purpose for which it was enacted but

must not unreasonably deprive an owner of all beneficial use of its property (see, Modjeska Sign Studios v. Berle, 43 N.Y.2d 468, 474, appeal dismissed 439 US 809; French Investing Co. v. City of New York, 39 N.Y.2d 587, 594-596, supra; Salamar Bldrs. Corp. v. Tuttle, 29 N.Y.2d 221, 225; Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 499). Plaintiffs' contention, however, was properly rejected.

As an initial matter, the $200,000.00 diminution in property value, Dorlee's only loss credited by nisi prius, while scarcely damnum absque injuria, does not evidence a deprivation of "all beneficial use of its property" to automatically void the ordinance. In any event, whatever economic fall-out the ordinance indirectly visits on the

plaintiffs, it does not reach the level where the plaintiffs' claims should override the safety of residents and an otherwise valid ordinance designed to promote the safety and welfare of the public (see, Health Ins. Assn. of Amer. v. Harnett; 44 N.Y.2d, 302, 310; Bakery Salvage Corp. v. City of Lackawanna, supra; Cities Serv. Oil Co. v. City of New York, 180 NY 27, 32, 33, affd 206 US 536). This is all the more so when one takes note that the property in question originally had alternative access to New York Route 9, that the prior owners apparently received compensation from the State when the alternate access was eliminated, and that Dorlee purchased the property with full knowledge that the only access was through the narrow neighborhood streets, presumably at a

price reflecting the limited access with a possibility of further limitation (cf. Bakery Salvage Corp. v. City of Lackawanna, supra). Lastly, in this connection, we find it not without significance that Dorlee's property is located in the Town of Cortlandt, not the City of Peekskill, for, as the Court of Appeals stated of a similar situation in Bakery Salvage Corp. v. City of Lackawanna, (supra, at p. 647), "it does not seem unreasonable for the town to which plaintiff pays substantial taxes to provide for plaintiff and other owners in its industrial zone access roads which would avoid an unreasonable use of the street in the neighboring city in violation of its local laws and ordinances".

We have considered plaintiffs' remaining argument based on the Commerce Clause and find it to be without merit cf. Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 669-670; Hospital Building Co. v. Trustees of Rex Hosp., 425 U.S. 738)..

THOMPSON, J. dissents and votes to reverse the judgment appealed from and to declare section 132-41 of the traffic ordinance of the City of Peekskill to be unconstitutional, with the following memorandum:

In my opinion, the subject traffic ordinance limiting the use of streets in the Bleloch Park section of the City of Peekskill to commercial vehicles 27 feet or less in length (with certain exceptions not applicable here) constitutes a deprivation of plaintiffs'

property rights without due process of law in violation of constitutional limitations. The evidence adduced at the trial amply demonstrates that the ordinance effectively deprives the plaintiffs of all reasonable use of the subject property without any corresponding manifestation that it promotes public safety.

In 1973 plaintiff Dorlee Property Corp. (Dorlee) began leasing an 11.8-acre parcel of property improved with a complex of three industrial buildings located in the Town of Cortlandt at the southern boundary of the City of Peekskill. In 1979 Dorlee purchased the subject premises . Since 1973, White Plains Automotive Supply Company, Inc. (WPA), an automotive-supply business owned and

operated by Dorlee's principals, has leased one of the buildings on the premises and part of another. The third building on the premises has been leased since 1981 to Consolidated Offset, a commercial printer.

The subject property is situated in a district designated "M-1, Light Industrial". This designation was accomplished by resolution in 1963. The area surrounding the subject property is essentially residential in character and has remained so throughout the period of Dorlee's possession. Prior to plaintiffs' possession of the subject property, access to the property was possible directly from Route 9. However, in the 1960's Route 9 was reconstructed and access from Route 9 to the subject parcel was completely

severed. Thereafter, the only vehicular access to this property was through the residential streets of Bleloch Park in the City of Peekskill.

The testimony adduced at the trial indicates that Dorlee derives its income exclusively from rental of space at the subject property and owns no other parcel of property from which it derives a regular income. WPA received deliveries of automobile parts from suppliers in the South and Midwest. Generally, WPA's deliveries were made in trucks in the 40 to 45-foot range. Deliveries to Consolidated Offset also were generally in trucks larger than 27 feet in length.

At the trial, plaintiffs further adduced the testimony of two real estate experts who agreed that the

best possible use of the subject premises was for industrial purposes and that enforcement of the ordinance would result in a drastic reduction in the property's utility, value and marketability. The testimony was to the effect that a diminution in market value of $303,000,00 and in net income of $33,922.00 would result from enforcement of the ordinance. Income from the property after enforcement of the ordinance would not cover all operating expenses and debt service so that such enforcement would force plaintiffs to operate at a substantial loss.

Since the instant dispute arose, WPA has made an effort to mitigate its damages and continue its operations by consolidating most of its business into a building located in the

Bronx. Although its profits were up, at the time of the trial WPA continued to pay $108,000.00 annually for rental of the virtually unused warehouse at the subject premises. WPA incurred expenses of $110,000.00 in its move to the Bronx and has lost customers. It also incurred added expenses in transportation costs to service its northern customers.

Enforcement of the ordinance essentially makes impossible WPA's continued operations at the subject premises. The owner of Consolidated Offset, Dorlee's other industrial tenant, also testified that enforcement of the ordinance will put him out of business because his company's current financial status renders moving to a new location impossible.

WPA has conducted its business at the same location for many years without incident. It was not until the summer of 1980 that a problem with the local residents developed. At that time, one of the local residents began parking his car at a strategic point on an access road making impossible the passage of trucks attempting deliveries to the subject premises. Requests to have the car moved were unsuccessful.

In response to the complaints of the neighboring residents, plaintiffs and representatives of the City of Peekskill and the Town of Cortlandt entered into discussions to consider possible solutions to the truck-traffic problem. Among the proposals considered were improving the existing access routes to accommodate the truck traffic;

construction of alternate access routes so that Bleloch Park could be avoided; building access directly onto Route 9; and establishment of a transshipment depot where deliveries to WPA could be removed to similar trucks. The City of Peekskill and the Town of Cortlandt considered the construction of an alternative route or improvement of existing routes to be too expensive despite plaintiffs' offer to pay one-half of any construction costs. Plaintiffs considered the transshipment depot to be prohibitively expensive.

Thereafter, the City of Peekskill adopted the ordinance in question as a legislative response to its residents' complaints.

To counterbalance the testimony of plaintiffs' witnesses

demonstrating the severe economic impact of the ordinance upon the plaintiffs, the City offered the testimony of several local residents. In substance, the residents' testimony was to the effect that the trucks are noisy, emit exhaust fumes which sometimes necessitate the closing of windows when the trucks pass, break tree branches, mount the curbs to execute turns, and cause vibrations. However, the record is devoid of evidence of any health risks or physical dangers associated with the truck traffic in the Bleloch Park neighborhood. None of the witnesses could recall any accidents involving trailer trucks on those streets in the 11 years of WPA's operation. The Mayor of Peekskill expressed fear that someone was going to

be killed and that the ordinance was passed, inter alia, to protect public safety. Nevertheless, contrary to the majority finding, no evidence was adduced to support the mayor's testimony. In fact, Police Department accident reports for the period 1980 to 1984 reflect only one occurrence involving a trailer truck and that accident involved a truck hitting an overhanging tree branch. Nor is there any evidence in the record that children play in the affected streets or are endangered by the truck traffic. In view of the gap in the offer of proof, I simply cannot agree with the majority that the ordinance, which will in effect deprive the plaintiffs of all beneficial use of the property, was properly

declared to be constitutional and valid as to the plaintiffs.

The applicable principals of law are set forth by the majority, i.e., that an ordinance is cloaked with a presumption of constitutional validity (see, Lighthouse Shores v. Town of Islip, 41 N.Y.2d 7) which presumption is rebuttable by proof beyond a reasonable doubt of the ordinance's unconstitutionality (see, Northern Westchester Professional Park Assoc. v. Town of Bedford, 60 N.Y.2d 492, 500). Equally well established, however, is that for an ordinance to be upheld as a proper exercise of a municipality's police power, the ordinance must reasonably relate to the purpose for which it is enacted. Determination of reasonableness is not governed by any

bright-line standard. Nevertheless, an analytical framework has evolved from the decisions in this area and was articulated by the Court of Appeals as follows:

> "[A] land use regulation * * * is deemed too onerous when it renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value'" (Spears v.

Berle, 48 N.Y.2d 254, 262, citing French Investing Co. v. City of New York, 39 N.Y.2d 587, 596).

Applying these principles to the case sub judice, I conclude that plaintiffs have successfully rebutted the presumption of constitutionality of the ordinance and have demonstrated its unreasonableness. The ordinance effectively destroys the economic value of the subject property without any demonstrated benefit to public safety. There is no other route into the premises other than through the streets restricted by the ordinance. The property is best suited for its current use and and its market value would be

drastically reduced by a lack of truck access. In fact, the evidence adduced at trial demonstrates that the property would be operated at a loss if it could not be effectively utilized for industrial purposes. Moreover, Trial Term's finding that the impairment of the property's value resulted from the State's termination of access from Route 9 is erroneous. Route 9 was rerouted a number of years prior to Dorlee's acquisition of the premises so that the diminution in value attested to by plaintiffs' real estate experts is measured by the property's economic use as of the time of plaintiff's possession (cf. Bakery Salvage Corp. v. City of Lackawanna, 24 N.Y.2d 643, 301 N.Y.2d 581, 249 N.E.2d 438).

The similarity between Peconic Ave. Businessmens' Assn. v. Town of Brookhaven, 98 A.D.2d 772, 469 N.Y.S.2d 483 and the present matter supports a determination of unconstitutionality. While the majority claims that the Peconic Ave. case is distinguishable, I read the evidence adduced at trial in a different light. In the Peconic Ave. case, this Court held unconstitutional an ordinance prohibiting trucks over 5,000 pounds from utilizing certain streets due to the failure of proof as to any factual justification for such regulation. Relative to its decision, the Court noted that the property values were severly depressed by the restrictive ordinance, the alternate route posed dangers to truck drivers and no evidence of the dangers associated

with truck traffic through residential neighborhoods was evident in the record.

Similarly, at bar, the evidence of danger to public safety relative to truck traffic is insufficient to justify the ordinance at issue. While the disagreeable quality of truck traffic to local residents in the affected area is unquestionably supported by the record, I cannot share in the majority's view that conclusions as to the dangers posed by the truck traffic sought to be enjoined may be drawn from the testimony presented.

Unlike the situation presented in Bakery Salvage Corp. v. City of Lackawanna, 24 N.Y.2d 643, 301 N.Y.2d 581, 249 N.E.2d 438, supra), in which the validity of an ordinance restricting to 10,000 pounds the weight of trucks

operating on certain residential streets was upheld, in Bleloch Park there are sidewalks and there is no evidence that children play in the streets. Moreover, in the Bakery Salvage case the company challenging the ordinance had purchased property at a modest price before truck access was terminated. However, the purchaser bought the property with full knowledge that access to the Thruway was going to be cut off and thereafter the trucks would have to use unsuitable residential streets (24 N.Y.2d 643, 646, 301 N.Y.S.2d 581, 249 N.E.2d 438, supra). At bar, the property was purchased long after access to Route 9 was terminated and the plaintiffs have operated many years at that site without incident.

In sum, the ordinance is unreasonable because it blocks the only means of entry to plaintiffs' property to trailer-truck traffic. The record demonstrates that the ordinance merely serves as a private convenience to the residents of Bleloch Park without any correspondence manifestation of public safety. Given the lack of evidence that the ordinance promotes more than public convenience or preference, it unreasonably deprives plaintiffs of their property without due process of law and is, therefore, invalid.

----------x

WHITE PLAINS AUTOMOTIVE SUPPLY CO., INC. and DORLEE PROPERTIES CORP.,

Plaintiffs,

- against -

CITY OF PEEKSKILL,

Defendant.

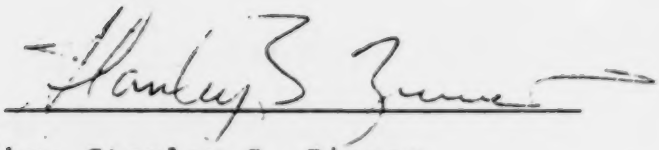
----------x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that White Plains Automotive Supply Co., Inc. and Dorlee Properties Corp., the plaintiffs above named hereby appeal to the Supreme Court of the United States from the final order of the New York Court of Appeals upholding the validity of a local traffic ordinance of the City of Peekskill, entered in this action on November 11, 1986.

This Notice of Appeal has been filed by mail with the Clerk of the New York Court of Appeals at Court of Appeals Hall, Albany, New York and with the Clerk of the New York Supreme Court, Westchester County at 111 Grove Street, White Plains, New York on February 9, 1987.

Dated: White Plains, New York
February 9, 1987



by: Stanley S. Zinner
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TEL: (914) 948-4800

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been mailed on this 9th day of February, 1987 to William J. Florence, Corporation Counsel for the City of Peekskill at his office located at City Hall, Peekskill, New York, the original Notice of Appeal has been filed by mail on February 9, 1987 with the Clerk of the Court of Appeals, State of New York at Court of Appeals Hall, Albany, New York, a copy thereof has been filed by mail on February 9, 1987 with the New York State Supreme Court, 111 Grove Street, White Plains, New York 10601.

Dated: White Plains, New York
February 9, 1987

STANLEY S. ZIMNER

Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

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IN THE

Supreme Court of the United States

October Term, 1986

WHITE PLAINS AUTOMOTIVE SUPPLY CO., INC. and DORLEE PROPERTIES CORP.,

Appellants,

against

CITY OF PEEKSKILL,

Appellee.

On Appeal from the Court of Appeals, State of New York

MOTION TO DISMISS

WILLIAM J. FLORENCE, JR.
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On the Motion:
BERNIS S. NELSON

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GROUNDS FOR DISMISSAL

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, Appellee moves the Court to dismiss the appeal herein on the ground that the judgment of the Court of Appeals, State of New York rests on an adequate non-federal basis as hereinafter set forth.

STATEMENT OF THE CASE

In 1978, Appellant Dorlee Properties Corp. acquired its property in the Town of Cortlandt located directly to the south of a residential neighborhood known as Bleloch Park in the City of Peekskill, with the full knowledge and actual notice that the only means of access to its property was through such residential neighborhood. The property had had alternate access from Route 9A prior to the construction of a four-laned limited access highway known as the Route 9 Bypass. The trial record indicates that owners prior to Appellants' tenancy had received compensation from the State of New York at the time of cutoff of alternate access.

Appellants' business increased steadily year after year. With approx-

imate gross sales of five million dollars in 1976 when it had been tenant on the property, Appellant White Plains Automotive Supply Co., Inc. grew into an over nine million dollar business in 1982.

Commencing in early 1981, Appellee began receiving numerous complaints from the residents of the Bleloch Park neighborhood concerning tractor-trailer trucks serving Appellants' property. The streets in the neighborhood are twenty to twenty-five feet in width and the blocks are very short averaging eighty to eighty-five feet in length. Eighteen-wheeler trucks were observed crossing both lanes of traffic, jumping curbs and mounting sidewalks in order to negotiate turns. The roads, curbs, sidewalks, sewer lines and storm drains began to deteriorate in the Bleloch Park neighborhood, particularly at

intersections. The vibrations of the trucks which weigh fifteen tons when empty and thirty-five tons when full caused plaster walls to crack in homes in the neighborhood and stones in exterior retaining walls to weaken and fall. The limbs of several large street trees were destroyed, telephone poles were sideswiped, and street signs were struck by the trucks. The residents were subjected to the noise of revving engines at intersections and the exhaust from diesel truck engines. Many of the homes in the neighborhood are located only twenty feet from the roadway and the residents kept their windows closed to prevent the intrusion of oily exhaust fumes.

Appellee undertook negotiations with the Appellants, the New York State Department of Transportation, State Senator Mary Goodhue, and the Town of

Cortlandt in which Appellants' operations were located to provide alternate access to the property other than through the Bleloch Park neighborhood, which efforts proved fruitless. Appellee proposed alternate sites for Appellants' operations, which overtures were rejected. Appellee studied the feasibility of widening certain streets within the Bleloch Park neighborhood but concluded, as confirmed by the trial court's personal inspection, that such rebuilding would be almost impossible due to the proximity of many homes to the street, the resultant intrusion into their front-yards, and sight distance limitations caused by retaining walls.

Having explored these alternatives, Appellee concluded that the only way by which the health, safety, and welfare of the neighborhood could be adequately protected would be through the enactment

of size restrictions on trucks traversing the neighborhood, as enabled under Section 1640(a) (5 and 20) of the Vehicle and Traffic Law of the State of New York.

ARGUMENT

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of this cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (citations omitted) Where the judgment of the State court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Lynch v. New York, 293 US 52, 54-55.

Appellants have argued throughout this case that Appellee's truck length restrictions deprive Appellants of private property without due process

of law and just compensation in violation of the State and Federal constitutional guarantees contained in Article 1, Sections 6 and 7(a) of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

The pertinent provisions of Article 1, Sections 6 and 7(a) of the State Constitution which read as follows are nearly identical to the Fifth and Fourteenth Amendment protections:

> No person shall be deprived of life, liberty or property without due process of law.
> ....
> Private property shall not be taken for public use without just compensation.

The decisions of the trial court and the appellate court, as affirmed by the Court of Appeals of the State of New York, uphold the constitutionality of the truck length restrictions as

promoting the health, safety, and welfare of the community and as outweighing the hardship experienced by Appellants due to such enactment. The only reference to the Federal due process and taking clauses found in the Appellate Division decision is in tandem with the parallel State provision. White Plains Automotive Supply Co., Inc. v. City of Peekskill, 115 NY AD 2d 728, 730, 497 NYS 2d 389 (2nd Dept.). The trial court decision contains no reference to either the State or Federal due process and taking clauses. Neither decision contains Federal citations in support of its due process and taking findings. Rather, both decisions rely extensively on and affirm the prior New York Court of Appeals holding in Bakery Salvage Corp. v. City of Lackawanna, 24 NY 2d 643, a case uncannily close on the facts to the instant case and decided

solely on State grounds. The traffic ordinance provisions challenged in Bakery Salvage, also restricted the size of trucks on certain residential streets, as enabled under Section 1640(a) (5 and 20) of the New York State Vehicle and Traffic Law.

The decision of this Court in Jankovich v. Indian Toll Road Commission 379 US 487 (1965) should control. That case held that "...even through a State court's opinion relies on similar provisions in both the State and Federal Constitutions, the State constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the State judgment." at 492. See also, Cramp v. Board of Public Instruction, 368 US 278; Perkins v. Benguet Mining Co., 342 US 437; Missouri v. Mayfield, 340 US 1; Minnesota

v. National Tea Co., 309 US 551; Tax Commission v. Van Cott, 306 US 511; Fox Film Corp. v. Muller, 296 US 207.

CONCLUSION

For the foregoing reasons, Appellee moves that this appeal be dismissed.

Dated: Peekskill, New York
March 5, 1987

Respectfully submitted,

WILLIAM J. FLORENCE, JR.

On the Motion:
Bernis S. Nelson